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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Definition of an Over-the-Air Signal of Grade B Intensity for Purposes of the Satellite Home Viewer Act	)	RM No. 9335
	)	
Petition for Declaratory Ruling and Rulemaking With Respect to Defining, Predicting and Measuring "Grade B Intensity" For Purposes of the Satellite Home Viewer Act	)	RM No. 9345

COMMENTS OF DIRECTV, INC.

On July 8, 1998, the National Rural Telecommunications Cooperative ("NRTC") filed an Emergency Petition For Rulemaking ("Petition") urging the Commission to initiate an expedited rulemaking proceeding to define "Grade B" signal intensity for purposes of the "unserved household" definition of the Satellite Home Viewer Act ("SHVA"), codified as amended at 17 U.S.C. § 119(d)(10).[1] On August 18, 1998, Echostar Communications Corporation ("Echostar") filed a similar petition for either a declaratory ruling or initiation of a Commission rulemaking proceeding both to define "Grade B" signal intensity for SHVA purposes, and to develop a corresponding SHVA-specific model for predicting and measuring Grade B intensity.[2] As set forth below, DIRECTV, Inc. ("DIRECTV")[3] believes that these

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1 *See* Public Notice, Report No. 2290 (released Aug. 5, 1998).

2 *See* Public Notice, DA 98-1710 (released Aug. 26, 1998).

3 DIRECTV is a wholly-owned subsidiary of DIRECTV Enterprises, Inc., a DBS licensee, which is a wholly-owned subsidiary of Hughes Electronics Corporation.

petitions should be granted, and that the declaratory rulings sought and/or requested proceeding should be made or commenced as soon as possible.

I. INTRODUCTION

DIRECTV is the United States' leading provider of DBS services. DIRECTV initiated its DBS service in late 1994, and currently offers more than 185 channels of all-digital, quality entertainment, educational and informational programming to customers equipped with an 18-inch satellite dish antenna. Although the multichannel video programming distributor ("MVPD") industry in which DIRECTV competes continues to be dominated by cable operators in most local markets,[4] DBS providers have a higher combined subscribership than any other MVPD alternative to incumbent cable systems.[5] DIRECTV itself has experienced tremendous growth since its inception, and currently serves in excess of 3.9 million subscribers nationwide.

DIRECTV strongly supports the expedited actions that the NRTC and Echostar have requested with respect to Commission development of an SHVA-specific definition of "Grade B" signal intensity, and corresponding predictive and measurement models. The issue of clarifying which subscribers truly are unable to receive a broadcast network picture of acceptable quality -- *i.e.*, that are "unserved households" for purposes of the satellite carrier compulsory copyright license codified at 17 U.S.C. § 119 -- is of tremendous importance to DIRECTV and its current and future subscribers, as well as to the future of the direct-to-home ("DTH") satellite industry generally. DIRECTV today offers its subscribers in areas unserved by local network

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4 According to the National Cable Television Association, cable's share of the MVPD market continues to be a tremendous 84.49%. *See* Comments of the National Cable Television Association, CS Docket No. 98-102 (July 31, 1998), at 6.

5 *See id.* at 8-9.

affiliates access to east and west coast feeds of CBS, NBC and ABC programming, and national feeds of Fox and PBS programming, through a contractual arrangement with PrimeTime 24, a satellite carrier and packager of satellite-delivered programming.

Unless the Commission acts quickly upon the NRTC and Echostar petitions, potentially well over a million current DBS subscribers who receive broadcast network station signals via satellite will lose access to this critical segment of programming. Of equal or greater importance, untold numbers of potential DBS subscribers, who are unable to receive either an acceptable off-air signal and are precluded from receiving a national satellite feed of network programming, will be forcibly driven into the waiting arms of incumbent cable operators as a result of litigation against PrimeTime 24 involving the Grade B issue that thus far has taken place in federal courts in Miami, Florida and Greensboro, North Carolina. DIRECTV has a vital interest in helping to prevent this result, which will be to the detriment of emerging satellite-based MVPD competition and the public interest.

In addition, the filing of a motion by the plaintiffs in the Miami case seeking the imposition of certain conditions on implementation of the court's preliminary injunction against PrimeTime 24 does nothing to lessen the urgency of FCC initiation of the requested proceedings.[6] The court has ordered compliance with the injunction by October 8, 1998, and the plaintiffs' motion does not change that date, nor does it seek to do so. Unless and until that date is changed by the judge at the request of the plaintiffs or the FCC, or by Congress passing a

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6 *See CBS Broadcasting, Inc., et al. v. PrimeTime 24 Joint Venture*, CIV-Nesbitt No. 96-3650, *Plaintiff's Motion for Imposition of Conditions on Implementation of Preliminary Injunction By PrimeTime 24* (filed Aug. 27, 1998) (S.D. Fla.) ("CBS Motion").

statute that would stay the court order, DIRECTV and other affected satellite providers could be at risk if they choose not to comply with the judge's order. Failure to comply with the court order could result in contempt sanctions. There in fact is no reason that the Commission should not proceed to grant the expedited relief that the Echostar and NRTC petitions request.

II. OVERVIEW OF THE PROBLEM

All of the programming carried by local broadcast stations today is subject to U.S. copyright laws and requires the permission of the copyright holder for any retransmission.[7] Section 119 of the SHVA currently provides satellite carriers with a license to retransmit programming broadcast by U.S. television stations for "private home viewing" by satellite subscribers without violating the copyrights of the owners of the programming.[8] For purposes of Section 119, broadcast stations are broken down into two categories: "superstations" and "network stations." The primary impact of this distinction is that the Section 119 license for network stations covers service only to "unserved households" (also sometimes referred to in industry parlance as "white areas"), *i.e.*, households (i) that cannot receive local broadcast signals of "Grade B" intensity, as defined by the FCC, using a conventional rooftop antenna, and

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7 For the "network" programming portions of the broadcast day, the local broadcast affiliate obtains the requisite copyright clearances from the network (*e.g.*, NBC for "Seinfeld"), but the grant from the network to the affiliate is limited to broadcast -- and not satellite -- television rights; in fact, in most instances, the networks have not obtained satellite rights from program producers, and could not grant them to the affiliate even if the network wished to do so. For the local syndicated programming portion, the affiliate again generally has not obtained satellite distribution rights from the syndicator (*e.g.*, King World for "Wheel of Fortune").

8 17 U.S.C. § 119(a).

(ii) have not received local broadcast signals through subscription to a local cable system within the past 90 days.[9]

There has been enormous and ongoing controversy in interpreting under what circumstances a potential satellite television subscriber is "unserved" such that the subscriber may be offered broadcast network signals via satellite. As the above-captioned petitions highlight, the controversy stems from the fact that Section 119 does not give clear guidance as to which households may lawfully receive network signals by satellite, or a straightforward mechanism to test which households are "served." In particular, the SHVA's use of the "Grade B" signal intensity standard, *as that standard currently is being interpreted and applied*, is extremely problematic. As the Copyright Office observed recently in reporting to Congress on potential changes to the Section 119 compulsory license regime, although a Grade B standard may be more objective than a pure "picture quality" standard, "over-the-air delivery of a signal of Grade B intensity does not guarantee a quality picture":

> Even if Grade B is retained, none of the parties have offered a solution as to how to conduct meaningful intensity measurements that are cost efficient for satellite carriers. As long as the cost of measurement exceeds the revenues of service, there is no economic incentive to conduct the measurement. If the cost of measurement is placed upon the subscriber desiring service, with perhaps the opportunity to recover the cost from the challenging network affiliate, clear engineering standards must be adopted so as to guarantee uniformity in testing and to assure that the subscriber will receive network service if the measurement reveals that he or she does indeed reside in an unserved household. Because it lacks

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[9] 17 U.S.C. § 119 (a)(2), (d)(10). By contrast, the license for superstations covers all U.S. households. "Superstations" essentially are all stations other than "network stations" secondarily transmitted by a satellite carrier. *See* 17 U.S.C. § 119(a)(1), (d)(9).

> engineering expertise, the Copyright Office cannot recommend what the measurement standards should be.[10]

The problems inherent in the SHVA Grade B signal intensity standard have been fomenting for several years. During the first term of the satellite carrier compulsory license, the issues surrounding the unserved household restriction "were of private concern between copyright owners, broadcasters and satellite carriers."[11] However, in 1994, with the adoption of Section 119's disastrously unworkable transitional signal measurement provisions, network satellite service for tens of thousands of satellite subscribers was terminated, leading to "a barrage of public complaints with the Copyright Office, the FCC, and the Congress," and the generation of increasing "consumer ill-will."[12]

The situation today has reached crisis proportions. Two different federal district courts recently have found that satellite carriers are liable for copyright infringement unless they measure signal intensity in accordance with the standard for Grade B signal strength allegedly set forth in the Commission's rules at 47 C.F.R. § 73.683.[13] Yet, in applying this purportedly "objective standard,"[14] these courts have employed divergent reasoning. In a case brought in

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10 U.S. Copyright Office, *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (August 1, 1997) ("Copyright Report"), at 125-26.

11 *Id.* at 120.

12 *Id.*

13 *ABC, Inc. v. PrimeTime 24*, Civ. Act. No. 1: 97CV00090, Order (M.D. N.C.) (Aug. 19, 1998) ("ABC Injunction Order"); *ABC, Inc. v. PrimeTime 24*, Civ. Act. No. 1: 97CV00090, *Order* (M.D. N.C.) (July 16, 1998) ("ABC July Order"); *CBS, Inc., et al. v. PrimeTime 24*, Case No. 96-3650-CIV-NESBITT, Supplemental Order Granting Plaintiffs' Motion for Preliminary Injunction (S.D. Fla.) (July 10, 1998) ("CBS Preliminary Injunction Order").

14 *CBS Preliminary Injunction Order* at 17.

Miami, Florida, in order to find "Grade B intensity," the court deferred to predictive Grade B contours based upon a variation of the so-called Longley-Rice methodology -- a model that encompasses the terrain particularities of individual markets in predicting whether a household is likely to receive a signal of Grade B intensity.[15] In a case brought in Greensboro, North Carolina, the court made no reference to predictive contours or methodologies at all, reasoning simply that the "SHVA's reference to 'an over-the-air signal of Grade B intensity (as defined by the Federal Communications Commission)' most naturally refers to the dBu's required for a signal of Grade B strength for each particular channel."[16]

In DIRECTV's view -- and, more importantly, from the perspective of the consumer -- both of these approaches are fatally flawed attempts to interpret and enforce the SHVA. The North Carolina court's sole focus on Grade B signal intensity, without more, simply

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15 *See id.* at 34-35 (preliminarily enjoining defendant satellite carrier from "retransmitting CBS or Fox network programming to any customer [who subscribes after March 11, 1997] within an area shown on a Longley-Rice propagation map as receiving a signal of at least grade B intensity" without either (i) obtaining consent from these networks or their local affiliate stations or (ii) providing the stations with a signal strength test showing that the customer cannot "receive a signal of Grade B intensity as established by the FCC"). Although DIRECTV is not a defendant in the Miami case, the court reasoned that the defendant satellite carrier, PrimeTime 24, works in "close concert" with its distributors, such as DIRECTV, and therefore the court's preliminary injunction could be "effectively nullified" if it did not apply to those distributors as well. *Id.* at 36. Therefore, the court ruled that DIRECTV and PrimeTime 24's other distributors are subject to the injunction. Thus, DIRECTV already has been directly and adversely affected by litigation over the Grade B standard and definition.

16 *ABC July Order* at *13*. A third case brought by the local NBC affiliate against PrimeTime 24 in federal court in Amarillo, Texas is pending. *See Kannan Communications, Inc. v Primetime 24 Joint Venture*, No. 2-96-CV-086 (N.D. Tex.). A preliminary injunction motion in that case has been heard and is awaiting the court's ruling. Therefore, there is the prospect that, if the preliminary injunction is granted, there would be yet a third interpretation of the statute.

begs the fundamental question of practical enforcement, *i.e*, how Grade B signal intensity can be meaningfully predicted and measured for purposes of assessing compliance with the SHVA compulsory copyright license regime. On the other hand, both the Echostar and the NRTC petitions highlight the deficiencies attending the use of a Longley-Rice methodology[17] and other predictive models of Grade B intensity that were *never intended* to be used for purposes of identifying "unserved households" under the SHVA -- as even the courts applying the standard [to protect broadcast interests] have recognized.[18]

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17 Echostar correctly points out that the Commission has not universally accepted the Longley-Rice methodology, and has adapted it as necessary to advance the policy goals attending different services. Thus, for example, the Commission used a variant of Longley-Rice -- and one different than that applied by the Miami court -- in the digital television ("DTV") context in order to achieve the goal of allotting DTV licenses to ensure non-interference. *See* Echostar Petition at 19; Advanced Television Systems and their Impact upon the Existing Television Broadcast Service, *Sixth Report and Order*, 12 FCC Rcd 14588, 14682 (1997). *None* of the policy objectives governing the DTV allotment proceedings are present in the SHVA context, and DIRECTV strongly agrees that development of an SHVA-appropriate model is essential. *See* Echostar Petition at 18-26.

18 *See ABC July Order* at 12 (noting that "Section 73.683(a) concededly was drafted with other purposes in mind"); *see also* Echostar Petition at 1, n.1 (noting that FCC "has specified that the predictive and measurement methodologies developed to date apply only to certain enumerated situations, including selection of transmitter sites by broadcast applicants and compliance by broadcasters with Commission obligations") Indeed, Subsections 73.683(c)(1)-(3) of the Commission's rules read as follows:

> (c) The field strength contours will be considered *for the following purposes only:*
>
> (1) In the estimation of coverage resulting from the selection of a particular transmitter site by an applicant for a TV station.
>
> (2) In connection with problems of coverage arising out of application of Sec. 73.3555 [the Commission's broadcast multiple ownership rules].
>
> (3) In determining compliance with Sec. 73.685(a) [the Commission's transmitter location and antenna system rule] concerning the minimum field strength to be provided over the principal community to be served.

Echostar correctly observes that the Commission to date "has not exercised its authority to provide direction on how to predict or measure Grade B intensity for purposes of the SHVA's 'unserved household' restriction."[19] To the extent that Congress has specifically deferred in the text of the SHVA to FCC expertise and associated rulemaking authority in defining, and in developing relevant predictive and measurement models of, Grade B signal intensity, DIRECTV agrees that it is time for the Commission to quickly bring that expertise to bear on these issues before the satellite industry suffers potentially crippling effects, and hundreds of thousands of consumers who cannot receive over-the-air broadcast signals are left without access to network programming. Indeed, one of the effects on the industry has been succinctly articulated by a recent joint letter from House Commerce Committee Chairman Tom Bliley and Senate Commerce Committee Chairman John McCain to Chairman Kennard:

> Our fear is that, once deprived of their network programming, consumers will abandon satellite television service in favor of other providers, namely incumbent cable service providers. The committee would view this turn of events not only as unfortunate but also counterproductive of our efforts to promote more competition in the MVPD marketplace.[20]

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47 C.F.R. § 73.683(c) (emphasis supplied).

19 Echostar Petition at 1.

20 Letter from Tom Bliley, Chairman, House Committee on Commerce and John McCain, Chairman, Senate Committee on Commerce, Science and Transportation, to William E. Kennard, Chairman, FCC (Aug. 19, 1998) ("Bliley & McCain Letter"). Representative Rick Boucher and 22 other members of Congress also have referenced the grave effects that would flow from the "imminent disenfranchisement of more than a million satellite consumers" as a result of the Miami court's interpretation of the Grade B standard," and urged the FCC as the appropriate expert agency to "define 'Grade B' for purposes of the SHVA." Letter from U.S. Representative Rick Boucher, et al. to Chairman William E. Kennard (Aug. 7, 1998).

The Commission has the legal authority and policy mandate to guard against applications of the SHVA that could have grave effects on MVPD competition by defining the appropriate definition and measurement methodology of Grade B signal intensity for SHVA purposes. It should do so as the NRTC and Echostar petitions have requested.

III. THE COMMISSION CAN AND SHOULD COMMENCE THE EXPEDITED RULEMAKING PROCEEDINGS THAT THE NRTC AND ECHOSTAR HAVE REQUESTED

The NRTC correctly points out that the interpretation and application of the "unserved household" restriction of the SHVA -- and especially the issue of measuring Grade B signal intensity -- affects literally millions of satellite consumers who are or may be threatened with termination of their network service. In particular, the Miami court has ordered satellite carrier PrimeTime 24 to cease providing service to customers who do not reside in unserved households based upon a predictive methodology that was never intended to apply to such determinations under the SHVA, which will result in potentially millions of subscribers losing access to satellite-delivered network signals. The permanent injunction entered by the North Carolina court goes even farther, and completely bars PrimeTime 24 from retransmitting ABC-affiliated stations into the plaintiff ABC affiliate's "local market."[21] Unlike the Miami court, the North Carolina court did not require the use of any predictive methodology -- it simply drew a circle around the transmitting tower.[22]

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21 *ABC Injunction Order* at 2.

22 The court defined the "local market" as the area encompassed within the station's predicted Grade B contour -- "a circular area with a radius of 75 miles emanating from the base of" the affiliate's transmitting tower near Garner, North Carolina. *Id.*

More generally, the problems with the SHVA's "unserved household" restriction have been documented by the Copyright Office:

> The unserved household restriction has created considerable turmoil not only between satellite carriers and broadcasters, but between consumers and the federal government. The Copyright Office has received more Congressional inquiries on the eligibility of satellite subscribers for network service than any other matter in history, and the FCC (as well as the Office) has been bombarded with literally thousands of calls and letters from irate subscribers who, for the most part, believe that federal law prevents them from obtaining network programming that they are willing to pay for and want to see.[23]

This consumer confusion and anger, left unchecked or unaddressed by policymakers, could have devastating consequences for the satellite industry and MVPD competition.

While the question of what to do about the unserved household restriction is a difficult one "which admits of no easy answer"[24] the need for FCC involvement in helping address the problems with the restriction is self-evident. As the Copyright Office has recognized, the unserved area restriction is essentially a "communications regulation" that "appropriately belongs" in the province of the FCC.[25] Unlike the Copyright Office, the FCC has the "considerable experience and expertise," and the "continuing jurisdiction and regulatory mechanisms to make adjustments to its regulations on a case by case basis should any difficulties

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23 *Copyright Report* at 115.

24 *Id.*

25 *Id.* at 116.

arise."[26] The FCC also has the "engineering expertise" to explore what measurement standards should be utilized to ascertain whether a subscriber is truly "unserved."[27]

Furthermore, the relief requested in the petitions is narrow and appropriate. The NRTC and Echostar simply have asked the Commission to become involved in an aspect of the "unserved area" restriction which Congress has *already* expressly delegated to the agency. The SHVA explicitly contemplates that "the Federal Communications Commission" will "defin[e]" an "over-the-air signal of grade B intensity" for purposes of the statute's application.[28] Given the considerable turmoil recently caused by the standard and the confused manner in which it has been interpreted by federal courts, FCC commencement of a rulemaking proceeding to consider the substance of such a definition is both urgent and appropriate.

A. The Commission Plainly Has The Legal Authority To Take The Actions That The NRTC And Echostar Have Requested

The National Association of Broadcasters ("NAB") asserts that there is no legal or policy basis for the Commission to address the important issues that the NRTC and Echostar have raised.[29] One of the NAB's primary claims is that, as a legal matter, Congress incorporated by reference an "objective" test of Grade B intensity, allegedly found in Commission rules that

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26 *Id.*

27 *Id.* at 126.

28 47 U.S.C. § 119(d)(10)(A).

29 *Preliminary Response of National Association of Broadcasters to Emergency Petition for Rulemaking Filed By the National Rural Telecommunications Cooperative* (July 17, 1998) ("NAB Response"), at 11.

were in effect when the statute was passed, and which the Commission now has no authority to address or revisit.[30] The NAB's position is without merit.

First, it is axiomatic that the text of Section 119 is the "best evidence" of Congress's intent with respect to the definition of a signal of "Grade B intensity."[31] In this regard, the plain language of the "unserved household" definition specifically references an "over-the-air signal of grade B intensity (*as defined by the FCC*)."[32] It does not expressly incorporate the language of any particular FCC rule. Instead, the statute explicitly defers to the FCC's authority to "define[]" Grade B signal intensity. In such an instance, where Congress "has explicitly left a gap for an agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation"[33] -- here, by commencing a proceeding to define "Grade B" for SHVA purposes.

In this regard, it makes no difference that Congress did not expressly "ask the Commission to engage in any rulemaking about Grade B intensity" as the NAB asserts.[34] The Supreme Court has noted that the "power of an administrative agency to administer a congressionally created program . . . necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly by Congress."[35] Thus, as the D.C.

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30 *Id.* at 21.

31 *West Va. Univ. Hosp., Inc. v. Casey*, 111 S. Ct. 1138, 1147 (1991); *Friends of the Earth v. Reilly*, 966 F.2d 690, 695 (D.C. Cir. 1992).

32 47 U.S.C. § 119(d)(10)(A) (emphasis added).

33 *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

34 *NAB Response* at 21.

35 *Morton v. Ruiz*, 415 U.S. 199, 231 (1974).

Circuit has explained, when Congress "leaves gaps . . . either explicitly by authorizing the agency to adopt implementing regulations, or implicitly by enacting an ambiguously worded provision, it has explicitly or implicitly delegated to the agency the power to fill those gaps."[36] Here, Congress's deference to the FCC's definitional authority can fairly be characterized as either an explicit or implicit delegation of authority to the Commission with respect to definition and implementation of the Grade B signal intensity standard. And the unfortunate and disparate application of the SHVA's Grade B standard by two federal courts highlights the problem of a court substituting its own construction of a statutory provision that in fact should be construed by reference to the authorized agency's guidance and expertise.[37]

Second, even if the statutory language could be interpreted as referencing a specific FCC rule, Section 119 does not freeze that rule in time as the NAB asserts. Indeed, if Congress had intended to do this, Congress would have taken the more particularized approach it took with respect to certain of the Section 111 compulsory license definitions, which reference in the text of the statute specific FCC regulations in effect at the time the legislation was drafted.[38] In the SHVA, by contrast, according to the express language of Section 119(d), Grade B signal

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36 *National Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563 (D.C. Cir.), *cert. denied*, 484 U.S. 869 (1987).

37 *See Chevron*, 467 U.S. at 844.

38 *See, e.g.*, 17 U.S.C. § 111(f) (definition of "local service area of a primary transmitter" explicitly references FCC regulations "in effect on April 15, 1976, or such station's television market as defined in section 76.55(e) of title 47, Code of Federal Regulations (as in effect on September 18, 1993) . . .").

intensity is uniquely within the province of the FCC to define in the first instance and to re-examine as necessary pursuant to its general rulemaking authority.[39]

Contrary to the NAB's assertions, there is no evidence that Congress intended to require regulation of "the present and the future within the inflexible limits of yesterday"[40] in deferring to the Commission's traditional authority "to adapt rules and practices to the Nation's needs in a volatile, changing economy."[41] As the Supreme Court has observed, it simply "is not true that whenever Congress enacts legislation using a word that has a given administrative interpretation it means to freeze that administrative interpretation in place."[42] DIRECTV wholeheartedly agrees with Echostar and the NRTC that the Commission "has the power to change the definition of Grade B intensity," as well as the attendant ability to develop a model for predicting it and rules for measuring it."[43]

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39 The NAB's citation to canons of construction that may pertain to inter-statutory references, NAB Response at 22, is misplaced. Such canons have "'little force in the administrative setting'" such as this one where Congress has deferred to an agency's general expertise in defining particular terms. *Cf. Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir. 1996) (quoting *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991)).

40 *American Trucking Ass'n v. Atchison, Topeka, and Santa Fe Railway Co.*, 387 U.S. 367, 416 (1967).

41 *Id.*

42 *Lukhard v. Reed*, 481 U.S. 368, 379 (1987); *see Helvering v. Wilshire Oil Co.*, 308 U.S. 90, 100-01 (1939) ("[It is not true that] regulation interpreting a provision of one act becomes frozen into another act merely by reenactment of that provision, so that that administrative interpretation cannot be changed prospectively through exercise of appropriate rulemaking powers.").

43 Echostar Petition at iii (footnote omitted).

IV. THE COMMISSION SHOULD DEFINE GRADE B SIGNAL INTENSITY AND DEVELOP AN SHVA-SPECIFIC GRADE B CONTOUR THAT PRESUMPTIVELY MEETS THAT DEFINITION

In order to be meaningful and workable from an enforcement perspective, DIRECTV agrees that the SHVA's use of the term "Grade B intensity" must be defined by reference to an accurate measure of signal reception as well as to an accurate methodology that can be used to predict the geographic areas, or "contours," that will receive the specified measure of signal intensity.[44]

The Commission's rules presently calculate Grade B "field strength contours" as follows:

	Grade A (dBu)	Grade B (dBu)
Channels 2-6	68	47
Channels 7-13	71	56
Channels 14-69	74	64

47 C.F.R. § 73.683(a). The rules acknowledge on their face that these contours are to be used "only" for certain purposes,[45] such as interference mitigation -- they are not and never have been intended by the Commission to be used for purposes of SHVA compliance. Thus, one of the first critical steps the FCC can take in an expedited rulemaking proceeding is to craft a similar rule that will specify signal strengths for each set of channels that are designed to more accurately reflect the receipt of a viewable picture. The FCC should seek engineering and industry comment as to what those signal strengths should be.

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44 *See* Echostar Petition at 6 ("unserved household" restriction cannot be enforced without a "model predicting Signal B intensity as well as a measurement method").

45 47 C.F.R. § 73.683(c).

Similarly, DIRECTV agrees that the FCC should develop a measurement methodology that more accurately measures signal strength to the home. As Echostar has explained, the Commission's present methodology for measuring signal strength does not account for various real-life factors that prevent many of those who are "measured" as receiving such signals from actually doing so.[46] Again, measurement rules intended for purposes of ensuring interference protection are quite different from those that should be developed to ensure that households designated as "served" are receiving signals of a strength that ensures a good quality picture for SHVA purposes.[47]

The NRTC and Echostar petitions also have effectively pointed out the deficiencies of the Commission's conventional Grade B contour model and the Longley-Rice methodology in terms of replicating realistically the intensity actually received at the homes of satellite television subscribers. These models are based on propagation assumptions that do not take into account trees, buildings, radio transmitter stations or other obstructions, or various morphological characteristics and factors attenuating a TV signal.[48] Similarly, they are based on three medians -- 50% of the locations, 50% of the time, with 50% confidence. While those parameters may be perfectly acceptable for selecting transmitter sites, predicting interference between adjacent stations or resolving multiple ownership rule issues,[49] these predictive criteria

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46 Echostar Petition at 27-29.

47 For example, as Echostar points out, signal intensity from a rooftop antenna loses strength as it travels through the cable connecting the antenna with a television set. "A signal equal to 47 dB at the roof would not be adequate *at the television.*" Echostar Petition at 27 (emphasis in original).

48 *See* Echostar Petition at 14-28; NRTC Petition at 13-14.

49 *See* 47 C.F.R. § 73.683(c)(1)-(3).

reflect an absurdly low probability of receiving acceptable service for purposes of effecting the objectives of the SHVA. That is, the clearly reasonable expectations of television consumers in the MVPD marketplace -- like the expectations of telephone, utility or newspaper consumers -- expect is that their service will be 99% -- and not 50% -- reliable.[50]

For these and other reasons, DIRECTV agrees with Echostar that a 99-99-99 model (*i.e.*, one that predicts the outermost boundary at which 99% of households receive a Grade B signal 99% of the time with 99% confidence) would be appropriate to utilize in the SHVA context.[51] To the extent that Echostar has requested the Commission to make various declaratory rulings confirming the inadequacy of the Commission's traditional measurement and predictive models for ascertaining Grade B signal intensity, including the Longley-Rice methodology, the Commission should so rule. In any event, the Commission should conduct an expedited rulemaking proceeding to develop an SHVA-appropriate measurement and predictive methodology in the manner requested.

One option the Commission should consider as it conducts such a proceeding is developing a predicted geographic contour, based on signal strengths that reflect assured receipt of a good quality picture, that would be given *presumptive and prescriptive weight* by decisionmakers for SHVA enforcement purposes. As the Copyright Office has reasoned:

> [T]he only clear-cut solution to the problem of determining eligibility is to establish well defined geographic areas wherein satellite service of a particular network is permitted and to exclude provision of service to all other areas. . . . Under this ["red zone/green zone"] approach, the local markets of a network

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50 *See* Echostar Petition at 20-21.

51 *Id.* at 29.

> affiliate would be defined, and satellite carriers would be denied the compulsory license for a network signal for any subscriber who resides within the local market of an affiliate of that same network (i.e., the "red zone"). Subscribers who reside outside the local market of a network affiliate could receive satellite service of that affiliate, i.e., the "green zone").

The Commission can and should develop an appropriate SHVA Grade B model that would establish a presumptive Grade B "red zone" in the manner described by the Copyright Office. That way, satellite carriers and broadcasters can achieve certainty with respect to the subscribers that should or should not be receiving satellite-delivered network signals.

Indeed, the idea is roughly similar to the approach followed by the Miami court, which has used Longley-Rice contour maps as an enforceable proxy for network station Grade B coverage areas. However, the Grade B definition reflected in the protected "red zone" contour that the FCC would define should be one that accurately incorporates the goals of the SHVA and the realities of the MVPD marketplace, rather than distorts that marketplace by utilizing methodologies that are ill-suited, and that were never intended to be used, for purposes of ensuring SHVA compliance. In addition, the presumptive legal effects accorded "red zone" and "green zone" geographic contours would ensure that "green zone" subscribers would be insulated from piecemeal challenges by network affiliates.

Finally, the Commission must ensure, as it examines these issues, that new SHVA signal strength measurements and predictive methodologies are in synch. If they are not, and there continue to be a large number of broadcaster challenges and large numbers of subscriber terminations, then the extremely problematic situation that exists today simply will not improve.

As a policy matter, the need for Commission action is dire. As the scope of the "Grade B" definition continues to be litigated in the federal courts without definitive guidance

from the FCC -- the expert agency that can take into account the public policy interests of and consequences for *both* the satellite and broadcast industries -- consumer confusion and anger will only continue to grow, as hundreds of thousands of subscribers living in areas that are not adequately served by off-air broadcast signals are nonetheless precluded from receiving network signals via satellite.[52] The Commission has the legal and policy mandate to step into the fray and minimize public confusion by offering clarification of the Grade B signal intensity standard. To the extent that subscribers are driven into the arms of cable monopolists by virtue of an unfortunate and unnecessary interpretation of the "unserved household" definition, the public interest result will be an extremely negative one for both competition and consumers.

V. CONCLUSION

For the foregoing reasons, DIRECTV respectfully urges the Commission to immediately take the actions requested in the Echostar and NRTC petitions.

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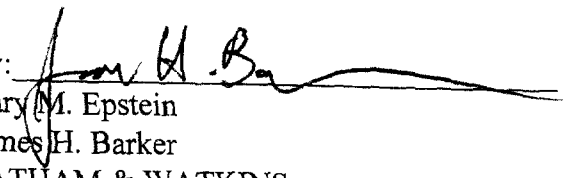
52 CBS and Fox have admitted as much, acknowledging the fact that viewers precluded from access to network signals by the Miami federal court's application of a -- in DIRECTV's view erroneous -- Grade B signal intensity standard and predictive methodology will be "upset and angry," and will have no alternative if they cannot receive an adequate over-the-air signal than to subscribe to a "cable service that offers local broadcast stations." *CBS Motion*, at 2. This of course is *exactly* the fear that has been expressed by Chairman Bliley and Chairman McCain. *See Bliley & McCain Letter*.

Respectfully submitted,

DIRECTV, INC.

By: 

Gary M. Epstein
James H. Barker
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W., Suite 1300
Washington, D.C. 20004-2505
(202) 637-2200